Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ROBERT SANFORD DIETRICH,

Respondent,

v.

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, Dietrich, an inmate imprisoned under a state court judgment, who filed his federal habeas petition too late, sought equitable tolling based on the claim that his state post-conviction attorney failed to keep him informed about the progress of his state post-conviction appeal, despite Dietrich's efforts to contact the attorney. Although it was unclear to what extent, if any, post-conviction counsel's failure to communicate had hindered Dietrich's efforts to seek relief, the Ninth Circuit decided that he was entitled to an evidentiary hearing on his equitable tolling claim. The court also accepted that the failure of Dietrich's post-conviction counsel to keep him informed about the status of his appeal could amount to an extraordinary circumstance warranting equitable tolling. The court proceeded on the assumption that equitable tolling can apply in this AEDPA (Anti-Terrorism and Effective Death Penalty Act) context.

The questions presented in this case are:

1. Is equitable tolling available to permit the filing of an otherwise untimely petition seeking relief in federal habeas corpus or do the provisions of 28 U.S.C. § 2244(d) fully define and circumscribe the circumstances in which the AEDPA one-year statute of limitations can be tolled or extended?

2. If equitable tolling is available, can attorney negligence, including a failure to communicate with a client, amount to an extraordinary circumstance that warrants equitable tolling of the AEDPA statute of limitations?

3. If equitable tolling is available, is a habeas petitioner entitled to an evidentiary hearing on such a claim where a court cannot tell from his submissions whether there is any causal relationship between his attorney's alleged failure to communicate about the status of a state-court case and the habeas petitioner's failure to file a timely petition? Has the Ninth

Circuit set the standard too low for obtaining an evidentiary hearing on equitable tolling, and is it applying inconsistent analyses to such claims?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Superintendent of the Oregon State Penitentiary, respectfully prays that the Court issue a writ of certiorari to review the judgment and decision of the Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum decision of the Ninth Circuit is not reported. *Dietrich v. Czerniak* (Ninth Circuit No. 04-36063). The decision is in the appendix. (Pet. App. 11). The magistrate judge's findings and recommendation, the district court's order adopting the findings and recommendation, and the district court's judgment dismissing this habeas corpus proceeding also are in the appendix. (Pet. App. 1, 8, 10).

JURISDICTION

Jurisdiction to review the judgment by writ of certiorari is conferred on the Court by 28 U.S.C. § 1254(1). The Ninth Circuit's memorandum decision was filed on September 28, 2006. This Court granted petitioner's application for an extension of time to file this petition for a writ of certiorari to and including January 26, 2007. This petition is being filed within the time granted by this Court.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2244(d) provides:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to a judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct

review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

This is a habeas corpus proceeding brought by respondent Dietrich, a prisoner in state custody, pursuant to 28 U.S.C. § 2254. The state and federal court proceedings in respondent's case are summarized below.

1. State trial and direct appeal

After being indicted in state court on charges of first degree sodomy, first degree sexual abuse, using a child in a dis-

play of sexually explicit conduct, first degree rape, first degree unlawful sexual penetration, and endangering the welfare of a minor, respondent pleaded guilty to two counts of first degree sodomy, one count of first degree rape, and one count of first degree unlawful sexual penetration. (E.R. 14).[1] "[P]ursuant to [respondent's] negotiations with the State," the remaining counts were dismissed. (E.R. 15). In an amended judgment dated June 16, 1994, the trial court imposed consecutive sentences on the sodomy and rape convictions (with a concurrent sentence on the unlawful sexual penetration charge) for a total sentence of 265 months. (E.R. 14-15).

Respondent appealed, contending that the trial court had erred in imposing consecutive sentences, in recomputing his criminal history score under the state's sentencing guidelines based on the immediately preceding conviction (for example, in recomputing the criminal history score on count 2 based on the conviction on count 1), and in failing to apply the so-called "200 percent" rule to cap the consecutive sentences. (E.R. 23). On July 21, 1995, the Oregon Court of Appeals affirmed without opinion. (E.R. 62). Respondent filed a petition for review with the Oregon Supreme Court, which denied the petition. (E.R. 55, 64). The appellate judgment issued on November 29, 1995. (E.R. 65).

2. State post-conviction and appeal

On January 29, 1997, respondent filed a *pro se* petition for state post-conviction relief. (E.R. 66). He raised claims of ineffective assistance of his trial counsel, alleging that he would not have pleaded guilty if he had understood how long his total sentence could be, if he had known that his sentences could be consecutive, and if he had understood that the crimi-

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[1] E.R. refers to the excerpt of record filed with the Ninth Circuit Court of Appeals.

nal history score could be recomputed based on the immediately preceding convictions. (E.R. 68-69). Later, counsel was appointed to represent respondent. (E.R. 74). The post-conviction trial court ruled against respondent's claims and denied him relief. (E.R. 128, 132).

Respondent appealed, and his attorney filed an appellant's brief on October 21, 1998. (E.R. 97). On December 9, 1998, the State filed a motion for summary affirmance in the Oregon Court of Appeals, contending that respondent's "brief on appeal does not present a substantial issue of law." (E.R. 139). On January 22, 1999, the Court of Appeals granted the State's motion. (E.R. 141). Under state law, respondent had 35 days within which to seek review in the Oregon Supreme Court. Or. R. App. Proc. 9.05(2)(a). When no petition for review was filed, the appellate court judgment issued on April 8, 1999. (E.R. 142).

On May 17, 2000, respondent filed a *pro se* "motion for leave to file late petition for review and for substitute counsel" in the Oregon Supreme Court. (E.R. 143). Respondent claimed that the motion was "necessary because [he] was not apprised by his [post-conviction] appellate attorney that a decision had been rendered by the Court of Appeals nor of the necessity to file a Petition for Review within the 35 day limit." (E.R. 143). In his motion, respondent also alleged that he

> is unskilled in the law and is completely dependent upon his attorney to advise him as to his legal rights. During the course of this [post-conviction] appeal, [respondent] received only a single letter from counsel. This letter, dated March 5, 1999, but not received by [respondent] until late May of 1999, was a response to a February 3, 1999 letter from [respondent] inquiring about the status of his appeal. In this

> letter, Counsel advised [respondent] that he had enclosed a copy of the Appellant's Brief filed on [respondent's] behalf, but that there had been no word on when the [state's] Respondent's Brief would be filed. Counsel further advised [respondent] that, if he had any questions, he could write or call.
>
> After receiving this letter, [respondent] attempted to write twice to further inquire into the status of his appeal. [Respondent] also attempted to call at least three times, but no call was ever accepted by Counsel's office. When [respondent] could not reach Counsel by mail or phone, he asked his mother to call in order to obtain the status of his appeal. [Respondent's] mother could only make contact with Counsel's answering machine, whereby she left messages but no calls were ever returned.
>
> [Respondent] has recently discovered that his case was disposed of by Summary Affirmance in favor of the [State]. However, to date, [respondent] has not received a copy of the Motion for Summary Affirmance nor a copy of Counsel's response. Nor, has [respondent] received a copy of the Appellate judgment that was entered on 04/08/1999. [Respondent] was only able to discover this information after obtaining a court docket sheet.

(E.R. 143-44). Respondent complained that his attorney had not kept him "apprised as to the status of [the] case and his obligations therein so that [respondent] could exercise his legal rights." (E.R. 144).

On July 12, 2000, the Oregon Supreme Court granted respondent's motion, appointed an attorney to represent him, and set a due date for the filing of a petition for review. (E.R. 147). Counsel later filed a petition for review on respondent's behalf, and that petition was denied on February 6, 2001. (E.R. 174).

3. Federal habeas corpus

a. District court

On April 10, 2001, respondent filed a *pro se* petition seeking relief in habeas corpus. (E.R. 1). Counsel was later appointed to represent him, and counsel filed an amended petition on June 21, 2002. (E.R. 8, 189). The amended petition raised claims of ineffective assistance of respondent's trial counsel that were related to the entry of respondent's guilty pleas and claims of trial court error that also related to the entry of those pleas. (E.R. 9-10). The State sought dismissal of the petition on the ground that it was not timely filed and, alternatively, based on the fact that the state courts' decisions are entitled to due deference. (E.R. 177).

In his findings and recommendation, the magistrate judge recommended that the petition should be denied and the action should be dismissed. (E.R. 181). The magistrate judge noted that the appellate judgment on respondent's direct appeal in state court had become final on November 29, 1995, "prior to the effective date of AEDPA [the Anti-Terrorism and Effective Death Penalty Act]." (E.R. 177). "As such, the one year statute of limitations provided for [in the AEDPA] did not start running until April 24, 1996, the date the statute went into effect." (E.R. 177).

> [Respondent's] PCR [post-conviction relief] filing occurred on or about January 29, 1997, approximately 280 days after the clock started to run. His PCR proceedings tolled the statute

> until April 8, 1999, when the appellate judgment became effective. On that date, the clock started to run again.
>
> Over a year after the appellate judgment became final, [respondent] sought, and was granted, permission to file an untimely petition for Oregon Supreme Court review of the denial of his PCR petition. At that point, the clock would clearly stop again.

(E.R. 177-78) (footnote omitted).

After first determining that respondent was not entitled to statutory tolling during the period between the issuance of the appellate judgment on post-conviction and the Oregon Supreme Court's order allowing respondent to file a "late" petition for review in that proceeding, the magistrate judge turned to the issue of equitable tolling.[2] (E.R. 179). The magistrate judge rejected the equitable tolling claim as well. (E.R. 179-80). Respondent

> point[ed] to the lack of assistance from his post-conviction attorney as the circumstance that prevented his timely filing, alleging that the attorney failed to notify him when the Oregon Court of Appeals granted summary affirmance, failed to notify him that he needed to seek review within 35 days, and failed to in-

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[2] The correctness of the statutory-tolling ruling is not before this Court. The Ninth Circuit also ruled that respondent is not entitled to statutory tolling during the time period that elapsed between the issuance of the appellate judgment on post-conviction and respondent's motion for leave to file an untimely petition for review. (Pet. App. 13-14).

> form him of the issuance of the appellate judgment. However, these allegations fall squarely within the parameters of ordinary attorney negligence that the Ninth Circuit has routinely held to be inadequate grounds for equitable tolling. *See, e.g., Frye v. Hickman,* 273 F.3d 1144, 1146 (9th Cir. 2001); *Ford v. Hubbard*, 330 F.3d 1086, 1106 (9th Cir. 2002); *see also* [*Miranda v.*] *Castro*, 292 F.3d [1063,] at 1067 n. 4 [(9th Cir. 2002)] (collecting cases); *cf. Spitsyn v. Moore*, 354 F.3d 796 (9th Cir. 2003) (holding that a complete failure to file his client's habeas petition and the retention of the client's file beyond the limitations period, despite numerous requests by the client, could be "sufficiently egregious" to warrant tolling).
>
> Because petitioner has not alleged facts which would warrant equitable tolling, and because his habeas petition was filed after the expiration of the AEDPA statute of limitations for such filings, the petition should be denied.

(E.R. 180).

On de novo review, the district court judge agreed with the magistrate judge's findings and recommendation. The district court denied the petition and dismissed the case. (E.R. 183, 184).[3]

b. Ninth Circuit

On appeal, the Ninth Circuit reversed and remanded to the district court "for an evidentiary hearing related to equitable

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[3] The court later issued a certificate of appealability. (E.R. 186).

tolling and for other proceedings not inconsistent with this decision." (Pet. App. 16). As noted, the court rejected respondent's statutory tolling claim. (Pet. App. 13-14). But the court determined that respondent was entitled to an evidentiary hearing on his claim of equitable tolling. Although the court recognized that "[t]he mere ineffective assistance of post-conviction counsel cannot be the basis for equitable tolling," the court also had acknowledged in the past that an attorney's misconduct could be sufficiently egregious to "'constitute an "extraordinary circumstance" warranting equitable tolling of AEDPA's statute of limitations.'" (Pet. App. 14, quoting *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003)) (additional citation omitted).

The district court had failed to "note the alleged attempts by [respondent] and his mother to reach the post-conviction counsel to inquire about [respondent's] case status." (Pet. App. 15). It was "thus unclear to what extent, if any, post-conviction counsel's lack of communication with or non-responsiveness to [respondent] and his mother hindered [respondent] from proceeding with his state application." (Pet. App. 15) (citation omitted). "Because [the court] consider[ed] there to be an insufficient development of the record, [the court could] not determine whether [respondent] faced extraordinary circumstances sufficient to justify equitable tolling." (Pet. App. 15). The court "conclude[d] that a remand is appropriate for an evidentiary hearing[.]" (Pet. App. 15). In the evidentiary hearing, the district court

> should determine the circumstances in which [respondent] attempted to inquire about the status of his case and obtain his file and any impact these circumstances, once determined by the district court, may have had on [respondent's] ability to advance his interests in seeking a timely discretionary review by the Su-

preme Court of Oregon of his post-conviction claims for relief.

(Pet. App. 15-16).

REASONS FOR GRANTING THE WRIT

In this case, where respondent claims he is entitled to equitable tolling because, despite his attempts to contact his attorney, his state post-conviction counsel did not keep him informed about the progress of his post-conviction appeal, the Ninth Circuit held that respondent's allegations are sufficient to entitle him to an evidentiary hearing on equitable tolling. At the heart of this case are the issues of whether equitable tolling is available at all in the AEDPA content and, if it is, whether allegations of attorney negligence and a failure to communicate are enough to state a claim of "extraordinary circumstances" and to warrant an evidentiary hearing on that claim.

In ordering that respondent is entitled to an evidentiary hearing on his equitable tolling claim, the Ninth Circuit made three significant legal errors. First, the court, relying on its own earlier decisions, proceeded on the assumption that equitable tolling applies in federal habeas cases that are governed by AEDPA. That assumption is incorrect. The detailed and express tolling provisions in section 2244(d) indicate that equitable tolling should not apply. Assuming that equitable tolling can apply, the Ninth Circuit also erred in accepting that mere attorney negligence and a failure to communicate can amount to an extraordinary circumstance that would warrant equitable tolling. That decision conflicts with the decisions of most other courts of appeals, which also are in analytical conflict with each other.

In addition, the Ninth Circuit mistakenly held that respondent is entitled to an evidentiary hearing on equitable tolling even though the court could not tell from respondent's plead-

ings and submissions whether the attorney's failure to communicate had any effect on respondent's ability to pursue his claims. Respondent failed to plead any causal relationship between the attorney's alleged failure to communicate and respondent's inability to file a timely petition, yet the court ordered that he is entitled to an evidentiary hearing. Such a lax pleading requirement, that rewards an insufficient pleading with a hearing, would entitle almost any habeas petitioner to an evidentiary hearing on equitable tolling. That outcome will result in many unnecessary evidentiary hearings, straining judicial resources, and subjecting the States of the circuit to considerable expense.

I. The Ninth Circuit erred in holding that equitable tolling is available to excuse the otherwise untimely filing of a section 2254 habeas petition.

In this case, the Ninth Circuit proceeded on the assumption that equitable tolling applies in the AEDPA context. The court cited its own decisions in which it had determined that equitable tolling applies. (Pet. App. 14-15, citing *Miranda v. Castro,* 292 F.3d 1063 (9th Cir. 2002); *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003); and *Frye v. Hickman*, 273 F.3d 1144 (9th Cir. 2001)). The court erred in assuming that equitable tolling is available in cases otherwise governed by the AEDPA one-year statute of limitations and in relying on that assumption when ordering that respondent is entitled to an evidentiary hearing.[4]

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[4] Admittedly, petitioner did not press this claim below. But respondent argued in his brief that equitable tolling was available (Opening Br. 23), and petitioner replied in part by noting that this Court has not decided the issue. (Appellee's Br. 30 n. 7, citing *Pace v. DiGuglielmo,* 544 U.S. 408, 418 n. 8 (2005)). In any event, it would have been futile to have pressed the claim that equitable tolling is not available. The

This Court has "never squarely addressed the question whether equitable tolling is applicable to AEDPA's statute of limitations." *Pace v. DiGuglielmo,* 544 U.S. 408, 418 n. 8 (2005). In *Pace,* the Court merely "assume[d] without deciding its application for purposes of th[at] case." *Id. Cf. Duncan v. Walker,* 533 U.S. 167, 182-84 (2001) (Stevens, J., concurring in part, joined by Souter, J.) (nothing in that case, "nor anything in the text or legislative history of AEDPA, precludes a federal court from deeming the limitations period tolled for such a petition as a matter of equity").

Concededly, most courts that have considered the issue have ruled that the one-year limitations period in §§ 2244 and 2255 is subject to equitable tolling. *See Williams v. Sims,* 390 F.3d 958, 962 (7th Cir. 2004) (collecting cases). Those decisions, however, have not given sufficient attention to the statutory text of those provisions and to the fact that, in section 2244 in particular, Congress explicitly prescribed the circumstances in which the one-year limitations period can be extended or tolled. Opinions that have reached or have suggested the opposite conclusion – and that have determined that equitable tolling is not or may not be available at all in the AEDPA context – have given more attention to the statutory text. *See Solomon v. United States*, 467 F.3d 928, 936 (6th

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Ninth Circuit repeatedly has embraced the concept of equitable tolling in the AEDPA setting, including in an en banc decision. *Calderon v. United States Dist. Court (Beeler),* 128 F.3d 1283, 1288 (9th Cir.), *cert. denied* 522 U.S. 1099 (1988), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly),* 163 F.3d 530 (9th Cir. 1998) (en banc), *cert. denied* 526 U.S. 1060 (1999). The State recently filed a petition for certiorari in another federal habeas case which also raises the issue of whether equitable tolling is available in the AEDPA context. *Belleque v. Kephart* (No. 06A573).

Cir. 2006) (Griffin, J., dissenting) (emphasizing the paramount significance of the statutory text, and indicating that the detailed and specific text of section 2255 does not suggest any Congressional intent to allow for equitable tolling); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (given the express tolling provisions of 28 U.S.C. § 2244(d), "it is unclear what room remains for importing the judge-made doctrine of equitable tolling"); *David v. Hall,* 318 F.3d 343, 346 (1st Cir.), *cert. denied* 540 U.S. 815 (2003) (noting that section 2244(d) defines the one-year limitations period "in detail" and that it "adopt[s] very specific exceptions;" "Congress likely did not conceive that the court would add new exceptions and it is even more doubtful that it would have approved of such an effort;" "AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up;" but assuming *arguendo* that equitable tolling can be available) (citations omitted); *United States v. Pollard*, 161 F. Supp. 2d 1, 12 (D DC 2001) ("The intent of Congress to prevent equitable tolling is indicated by the specific provisions in § 2255 to control the statute of limitations"); *Giles v. United States*, 6 F. Supp. 2d 648, 650 (ED Mich 1998) ("The detail of § 2255 and its direct and express determination of when the time limit begins indicates that Congress did not intend to permit courts to read other unmentioned and open-ended equitable exceptions into the statute") (citation omitted). This Court should grant certiorari to resolve the conflicting views about whether equitable tolling is available under the AEDPA to excuse the otherwise untimely filing of habeas petitions. That issue is extremely important to States, to habeas petitioners, and to the lower federal courts.

This Court also should review this issue because the decision of the Ninth Circuit (and of the other courts that have held that equitable tolling is available in this context) appear

to be in tension with recent decisions of this Court holding that equitable tolling is not available when Congress has crafted a plain, specific, and detailed statute of limitations. In *United States v. Brockamp*, 519 U.S. 347 (1997), this Court unanimously rejected the invitation to rewrite "for nonstatutory equitable reasons" a statute of limitations enacted by Congress for the filing of tax returns. The Court held that the statute's detail and its "explicit listing of exceptions" indicated that "Congress did not intend courts to read other unmentioned, open-ended, 'equitable' exceptions into the statute that it wrote." *Brockamp,* 519 U.S. at 352. Similarly, a year later in *United States v. Beggerly*, 524 U.S. 38, 48 (1998), this Court reiterated that "[e]quitable tolling is not permissible when it is inconsistent with the text of the relevant statute." That teaching appears to have been largely forgotten when the issue has been whether equitable tolling is consistent with the text of the AEDPA. *But see Solomon,* 467 F.3d at 937-39 (Griffin, J., dissenting, relying on the Court's decisions in *Brockamp* and *Beggerly* to conclude that equitable tolling should not be available under section 2255).

II. The Ninth Circuit derived an extraordinary circumstance from mere attorney negligence; its decision conflicts with that of other circuits.

Based on the assumption that equitable tolling is available in cases governed by the AEDPA's statute of limitations, this Court has held that, "[g]enerally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. "*Pace v. DiGuglielmo*, 544 U.S. at 418, citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990). The focus in this case is on the existence of extraordinary circumstances. At least for present purposes, the State accepts that respondent has adequately alleged that he attempted to contact his post-

conviction appellate attorney (although, as discussed below, he has not adequately alleged any causal relationship between his attorney's negligence and his inability to file a timely habeas petition).

In this case, the Ninth Circuit held that a state post-conviction attorney's failure to keep his client apprised of the progress of a post-conviction appeal could amount to an "extraordinary circumstance" warranting equitable tolling of the AEDPA statute of limitations. Although the court professed adherence to the rule that "[t]he mere ineffective assistance of post-conviction counsel cannot be the basis for equitable tolling" (Pet. App. 14), the court appears to have accepted that mere attorney negligence can be an "extraordinary circumstance." Respondent's claim is simply that his attorney failed to keep him informed about what was happening with his post-conviction appeal, despite respondent's efforts to contact the attorney. Because of that failure, respondent alleges that he did not know that the Oregon Court of Appeals had decided his case and that a petition for review was due. That is a claim of negligence only.

Other courts of appeals have refused to accept similar claims of attorney negligence. Their decisions conflict with the Ninth Circuit's decision in this case and, at least in some respects, the decisions also conflict with each other. The First, Third, Fourth, Fifth, and Eleventh Circuits have held that attorney negligence, such as the failure to notify a client of the denial of state post-conviction or misadvice about the AEDPA statute of limitations, is not an extraordinary circumstance that warrants equitable tolling. In *LaCava v. Kyler*, 398 F.3d 271 (3rd Cir. 2005), in seeking equitable tolling the petitioner relied on the fact that his attorney had not informed him that the state supreme court had denied his post-conviction petition. The Third Circuit rejected the claim. "[A]ttorney error, miscalculation, inadequate research, or other mistakes have

not been found to rise to the 'extraordinary' circumstances required for equitable tolling." *LaCava*, 398 F.3d at 276 (internal quotation marks and citations omitted).[5]

In *Rouse v. Lee,* 339 F.3d 238, 248 (4th Cir. 2003) (en banc), *cert. denied* 541 U.S. 905 (2004), the court held that an attorney's misinterpretation of law is not a basis for equitable tolling.

> This circuit has held that "a mistake by a party's counsel in interpreting a statute of limitations does not present the extraordinary circumstance beyond a party's control where equity should step in to give the party the benefit of his erroneous understanding." *Harris*[*v. Hutchison*], 209 F.3d [325,] at 331 [(4th Cir. 2000)]. A majority of other circuits agree. *See Merritt v. Blaine*, 326 F.3d 157, 169 (3rd Cir. 2003) (applying general rule that "attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling") (internal quotation marks omitted [in *Rouse*]); *Beery v. Ault*, 312 F.3d 948, 951 (8th Cir. 2002) ("Ineffective assis-

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[5] Citing its own earlier decision in *Seitzinger v. Reading Hosp. & Med. Ctr.,* 165 F.3d 236 (3rd Cir. 1999), the court suggested that an attorney's affirmative misrepresentation might be a different matter. *LaCava*, 398 F.3d at 276. In *Seitzinger*, the court had held that "an attorney's affirmative misrepresentation to his client that he had filed a timely complaint on her behalf when in fact he had not, coupled with the plaintiff's extreme diligence in pursuing her claim, 'created a situation appropriate for tolling.'" *Id.*

> tance of counsel generally does not warrant equitable tolling."); *Fierro v. Cockrell*, 294 F.3d 674, 683 (5th Cir. 2002) ("Counsel's erroneous interpretation of the statute of limitations provision cannot, by itself, excuse the failure to file [the] habeas petition in the district court within the one-year limitations period."); *Smaldone v. Senkowski*, 273 F.3d 133, 138 (2nd Cir. 2001) ("Attorney error [is] inadequate to create the 'extraordinary' circumstances equitable tolling requires."); *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir.) ("We conclude that the miscalculation of the limitations period by Frye's counsel and his negligence in general do not constitute extraordinary circumstances sufficient to warrant equitable tolling."); *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999) (holding that a lawyer's miscalculation of the limitation period was not a valid basis for equitable tolling); *Sandvik v. United States*, 177 F.3d 1269, 1272 (11th Cir. 1999) (refusing to apply equitable tolling where late filing was caused by attorney's use of ordinary mail to send petition less than a week before it was due); *Gilbert by Gilbert v. Sec. of Health & Human Servs.*, 51 F.3d 254, 257 (Fed. Cir. 1995) ("The negligence of Gilbert's attorney does not justify equitable tolling").

Rouse, 339 F.3d at 248-49 (footnote omitted). *See also Harris v. Hutchison*, 209 F.3d 325, 331 (4th Cir. 2000) (attorney's mistake in interpreting statute of limitations is not an extraordinary circumstance).

Other cases from other circuits are similar. *See Cordle v. Guarino*, 428 F.3d 46, 48 (1st Cir. 2005) (attorney's errors in

calculating time limits or advising petitioner of the filing deadlines do not constitute extraordinary circumstances); *Cousin v. Lensing*, 310 F.3d 843, 848 (5th Cir. 2002), *cert. denied* 539 U.S. 918 (2003) (attorney's failure to check status of case does not warrant equitable tolling); *Helton v. Sec'y for Dept. of Corrections*, 233 F.3d 1323 (11th Cir. 2000) (attorney miscalculation of limitations period or mistake is not a basis for equitable tolling).

The Seventh Circuit has taken a more extreme approach. Under that circuit's case law even complete attorney incapacity or directly misleading advice cannot amount to an extraordinary circumstance justifying equitable tolling. *Modrowski v. Mate*, 322 F.3d 965, 966 (7th Cir.), *cert. denied* 540 U.S. 925 (2003) (attorney incapacity "is analogous to an attorney's failure to act as a result of negligence, for which we do not permit equitable tolling"); *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005) ("Even before *Pace*, this court had rejected applying equitable tolling to circumstances where counsel directly misled a client that he filed a timely petition") (citation omitted).

Other courts and decisions distinguish between attorney negligence and affirmative misrepresentations, finding the former not enough to warrant equitable tolling, while the latter may suffice. *See Brown v. Shannon*, 322 F.3d 768, 774 (3rd Cir.), *cert. denied* 539 U.S. 948 (2003) (contrasting negligence with a situation where an attorney "affirmatively lied" to his client when he said that he had filed a complaint on her behalf); *United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002) (attorney's affirmative misrepresentations can be grounds for equitable tolling); *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 241 (3rd Cir. 1999) (same, because affirmative misrepresentations go "beyond garden variety neglect"). *See also Schlueter v. Varner*, 384 F.3d 69, 76 (3rd Cir. 2004), *cert. denied* 544 U.S. 1037 (2005) (distinguishing be-

tween attorney misrepresentation as to what he will do, which is not enough for equitable tolling, and misrepresentation as to what he has done, which might be sufficient). However, in *Modrowski,* 322 F.3d at 968, the Seventh Circuit expressly disagreed with the distinction between attorney negligence and affirmative misrepresentation, noting that court has held that "attorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client." (Citations omitted).

Still other courts and decisions appear to apply an analyses that approximates the one employed by the Ninth Circuit in this case. *See United States v. Martin*, 408 F.3d 1089, 1094-95 (8th Cir. 2005) (misleading client and failure to communicate can amount to extraordinary circumstance); *Baldayaque v. United States,* 338 F.3d 145 (2nd Cir. 2003) (attorney misadvice and failure to communicate with client may provide basis for equitable tolling).

In sum, the Ninth Circuit's decision in this case conflicts with the vast majority of decisions from the federal courts of appeals that have held that attorney negligence, erroneous advice, and a failure to communicate are not extraordinary circumstances that can justify equitable tolling. Beyond that, the courts of appeals apply differing analyses to equitable tolling claims based on attorney error, with some courts (and some decisions) rejecting such claims categorically, while others draw a distinction between attorney negligence and affirmative misrepresentation or even between misrepresentation about what will be done as opposed to what has been done. The case law in this area appears to be in disarray and, in an area where reasonable predictability is important both to habeas petitioners and the States, the results seem conflicting and almost random. This Court should issue the writ to consider when, if ever, attorney negligence, misconduct, misad-

vice, and failure to communicate with a client can amount to an extraordinary circumstance justifying equitable tolling.

III. The Ninth Circuit set the bar for obtaining an evidentiary hearing far too low; its approach conflicts with that of other circuits.

The State has recently filed a petition seeking the issuance of a writ of certiorari in a Ninth Circuit case in which that court ordered that a federal habeas petitioner was entitled to an evidentiary hearing on equitable tolling based on merely conclusory allegations that he was diligent because he used the prison law library occasionally and knew what was in it. *Belleque v. Kephart* (No. 06A573). Those scant allegations, the Ninth Circuit held, were a sufficient showing of diligence to entitle the petitioner to an evidentiary hearing on his equitable tolling claim. *Roy v. Lampert*, 455 F.3d 945, *amended* 465 F.3d 964, 971 (9th Cir. 2006). In its petition in that case, the State argued that if those allegations of diligence are enough to warrant an evidentiary hearing, then virtually any prisoner who advanced an equitable tolling claim and made the most minimal showing would be entitled to an evidentiary hearing. Such a result, the State argued, would waste district court time and subject the States in the circuit to many unnecessary evidentiary hearings.

The State also pointed out that the Ninth Circuit's approach is contrary to that adopted by other circuits. The Eleventh Circuit has held that an evidentiary hearing need not be held on a claim of equitable tolling "'when [a habeas petitioner's] claims are merely conclusory allegations unsupported by specifics.'" *Pugh v. Smith*, 465 F.3d 1295 (11th Cir. 2006), quoting *Drew v. Dep't of Corrections*, 297 F.3d 1278, 1293 n. 7 (11th Cir. 2002), *cert. denied* 537 U.S. 1237 (2003), in turn quoting *Tejada v. Dugger*, 941 F.2d 1551, 1559 (11th Cir. 1991), *cert. denied* 502 U.S. 1105 (1992). *See also Drew*, 297 F.3d at 1293 ("In light of the wholly conclusory nature of

Drew's recently-presented allegations and in the absence of supporting evidence, the district court did not abuse its discretion in deciding not to hold a hearing"). Similarly, the Seventh Circuit has stated that an evidentiary hearing is not required "when a petitioner's allegations are 'vague, conclusory, or palpably incredible, rather than detailed and specific.'" *Kato v. United States*, 467 F.3d 1063, 2006 U.S. App. LEXIS 27262, **8 (7th Cir. 2006), quoting *Bruce v. United States*, 256 F.3d 592, 597 (7th Cir. 2001) (internal citations and internal quotation marks omitted in *Kato*).[6]

The Ninth Circuit's approach in *Roy v. Lampert* and in this case stands in stark contrast to the approach of the Eleventh and Seventh Circuits. In *Roy* the court ordered an evidentiary hearing on a claim of equitable tolling based on the most conclusory of allegations of diligence. Such conclusory allegations would not suffice in the Eleventh or Seventh Circuits.

In addition to the direct conflict with the Eleventh and Seventh Circuits, the Ninth Circuit's ready willingness to order an evidentiary hearing based on mere conclusory allegations conflicts with the case law of other circuits as well. In *LaCava v. Kyler*, 398 F.3d at 277, the Third Circuit indicated

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[6] In addition to disagreeing about the standard that applies when deciding whether to grant an evidentiary hearing, the courts of appeals disagree about the standard of review that applies to such a decision. *See, e.g., Rouse*, 339 F.3d at 247 & n. 7-9 ("The other circuits are divided on the proper standard of review, with some applying abuse of discretion and others applying de novo review. Several circuits provide for de novo review in certain circumstances, and abuse of discretion review in all other circumstances") (footnotes omitted). In this case, it is not clear what standard of review the Ninth Circuit applied.

that an evidentiary hearing concerning equitable tolling is not warranted if the petitioner fails to show that he exercised reasonable diligence in attempting to file a timely petition. *See also Robinson v. Johnson,* 313 F.3d 128, 142 (3rd Cir. 2002), *cert. denied* 540 U.S. 826 (2003) (evidentiary hearing need not be held in every case where the petitioner claims he was deprived of access to his legal materials; no hearing required when the deprivation was relatively brief, petitioner said he needed the materials for state court filings, and ultimately he filed federal habeas without them).

In this case, the Ninth Circuit compounded the error it made in *Roy v. Lampert,* and took an approach that is inconsistent with and even less demanding than that taken by the court in *Roy.* At least in *Roy* the court stated at one point that the rule was that a habeas petitioner "should receive an evidentiary hearing when he makes a good-faith *allegation that would, if true*, entitle him to equitable tolling.'" *Roy,* 465 F.3d at 969, quoting *Calderon v. United States Dist. Court (Beeler),* 128 F.3d 1283, 1288 (9th Cir. 1997), *overruled on other grounds by Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9th Cir 1998) (en banc) (emphasis in *Roy*). In this case, however, according to the court respondent was entitled to an evidentiary hearing because the court could not tell whether the lack of communication from respondent's post-conviction counsel "hindered [respondent] from proceeding with his state application." (Pet. App. 15). It was "unclear to what extent, *if any*," respondent had been hindered by his attorney's alleged failure to communicate. (Pet. App. 15) (emphasis added).

To order an evidentiary hearing on equitable tolling -- when it is unclear whether the claimed hindrance had *any* effect on the habeas petitioner's ability to pursue his rights, and when it thus is unclear whether there is any causal relationship between the claimed hindrance and the failure to file

timely -- is to reward poor pleading and to force upon the district court and the State an evidentiary hearing based on wholly insufficient allegations. Viewing this case and *Roy* together, it is apparent that the Ninth Circuit is applying inconsistent and insufficiently demanding standards when determining whether to order evidentiary hearings on equitable tolling. The Ninth Circuit has set the bar that must be cleared to obtain an evidentiary hearing much too low. Its approach to the issue conflicts with that employed by other circuits, which demand more from a habeas petitioner. The Ninth Circuit's approach will waste considerable trial court time and consume scare judicial resources. It will force the States of the circuit into unnecessary evidentiary hearings in many cases. The availability of an evidentiary hearing on equitable tolling should not vary widely from circuit to circuit. To ensure some uniformity of federal practice, this Court's intervention and guidance is needed.

CONCLUSION

For the reasons discussed above, petitioner respectfully requests that this Court grant the petition for certiorari and reverse the decision of the court below

Respectfully submitted,

HARDY MYERS
Attorney General of Oregon
PETER SHEPHERD
Deputy Attorney General
MARY H. WILLIAMS
Solicitor General
JANET A. METCALF
Assistant Attorney General
Counsel for Petitioner

January 26, 2007

App. 1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

ROBERT S. DIETRICH, Civil No. 01-498-TC

Petitioner,

vs.

S.W. CZERNIAK,

Respondent.

FINDINGS AND RECOMMENDATION

COFFIN, Magistrate Judge

BACKGROUND

Petitioner was indicted by a grand jury on charges of Sodomy in the First Degree (two counts), Sexual Abuse in the First Degree, Using a Child in the Display of Sexually Explicit Conduct, Rape in the First Degree, Unlawful Sexual Penetration in the First Degree, and Endangering the Welfare of a Minor (two counts), stemming from allegations that he sexually abused his stepdaughter from the time she was five until she turned ten and reported him. Although petitioner told his attorney at the outset of criminal proceedings that he wanted to plead guilty to all the charges, counsel advised him to wait and see if she could negotiate some of the charges away. Counsel felt that if the case were to go to trial, petitioner would be convicted on all charges. Petitioner ultimately wanted counsel to get the best deal possible, but continued to tell counsel that he did not want to go to trial. Eventually, petitioner's attorney secured a deal that required petitioner to plead guilty to four charges – two counts of first-degree sod-

omy, and one count each of first degree rape and first-degree unlawful sexual penetration – in exchange for the dismissal of the other four. After accepting his guilty pleas, the court sentenced petitioner to a total incarceration term of 265 months.[7]

Petitioner appealed his sentence, but the Oregon Court of Appeals denied his appeal without opinion. State v. Dietrich, 135 Or. App. 698, 899 P.2d 764 (1995). Petitioner sought review by the Oregon Supreme court, but review was denied. State v. Dietrich, 322 Or. 168, 903 P.2d 886 (1995), The appellate judgment became final on November 29, 1995.

Petitioner filed a petition for post-conviction relief, but the PCR court denied relief. He appealed the PCR court's decision, but the Oregon Court of Appeals granted summary affirmance. Petitioner did not immediately seek review by the Oregon Supreme Court, and in the absence of a petition for review, the appellate judgment became final on April 8, 1999.

On May 17, 2000, thirteen months after the appellate judgment became final, petitioner filed a motion with the Oregon Supreme Court seeking leave to file a late petition for review. The court granted that petition, and petitioner filed a petition for review. That petition was denied on February 6, 2001

On April 10, 2001, petitioner filed the petition for federal habeas corpus relief close [*sic*] presently before the court, alleging ineffective assistance of counsel and trial court error, both related to his entering guilty pleas to four of the eight charges against him. Respondent seeks dismissal of the peti-

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[7] The term reflects a sentence of 58 months on the first sodomy conviction, a consecutive 91-month sentence on the second sodomy conviction, a consecutive 116-month sentence on the rape conviction, and a concurrent 121-month sentence on the unlawful penetration conviction.

tion on the grounds that it was not timely filed, and in the alternative argues that the state courts' decisions are due deference.

STANDARD OF REVIEW

Under the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a petitioner can seek federal habeas relief only within one year of the date on which the judgment became final by the conclusion of direct review, or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). AEDPA became effective on April 24, 1996. Any prisoner whose direct appeal had been final before that date had until April 23, 1997 to file his petition for federal habeas relief, or to properly file a legitimate state court action challenging the conviction, which would have the effect of tolling the running of the statute. 28 U.S.C. 2244(d)(2).

DISCUSSION

The appellate judgment on petitioner's direct appeal became final on November 29, 1995, prior to the effective date of AEDPA. As such, the one year statute of limitations provided for did not start running until April 24, 1996, the date the statute went into effect. Petitioner's PCR filing occurred on or about January 29, 1997, approximately 280 days after the clock started to run. His PCR proceedings tolled the statute until April 8, 1999, when the appellate judgment became effective. On that date, the clock started to run again.

Over a year after the appellate judgment became final, petitioner sought, and was granted, permission to file an untimely petition for Oregon Supreme Court review of the denial of his PCR petition.[8] At that point, the clock would

[8] Under the Oregon Rules of Appellate Procedure, petitioner had 35 days to seek review. ORAP 9.05(2).

clearly stop again. The critical question is whether petitioner's motion should operate retroactively to erase the time elapsed between the date the appellate judgment became final and the date petitioner filed his motion for leave with the Oregon Supreme Court. I find that it should not.

The operative statue regarding the tolling of statute of limitations for ongoing state proceedings is 28 U.S.C. § 2244(d)(2), which provides that:

> The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

That provision suggests that a state post-conviction petition is pending from the time it is filed until the time the appellate judgment becomes final, including the time between the conclusion of one level of consideration and the start of the next level (i.e., the time after the trial court denies a petition but before the petitioner files his appeal). This interpretation was recently supported by the United States Supreme Court in Carey v. Saffold, 536 U.S. 214 (2002), where the court stated that an application is pending "as long as the ordinary state collateral review process is 'in continuance' – i.e. 'until the completion of that process.' In other words, until the application has achieved final resolution through the state's post-conviction procedures, by definition, it remains 'pending.'" Id. at 219-20. Put another way, the petitioner is entitled to "one full round" of collateral review without the interference of the federal statute of limitations. Id. at 222.

Petitioner argues that Carey compels the conclusion that the statute of limitations clock should be wound back from the date he filed his motion for leave with the Oregon Supreme Court to the date he filed his post-conviction petition, because

each filing was in the same round of collateral attack. However, Carey need not, and should not, be interpreted so broadly.

As noted above, the court interpreted "pending" to mean that the process is "in continuance" and that the statute should be tolled until final resolution "through the State's post-conviction procedures." However, here petitioner's collateral proceeding was not in continuance between the time the Oregon Court of Appeals granted summary affirmance to the time he sought leave to file a petition for review. The proceeding ended when he did not seek review by the Oregon Supreme Court in the time allowed for by the Oregon Rules of Appellate Procedure, as reflected by the fact that the final appellate judgment issued in April 1999. Thus, pursuant to "the State's post-conviction procedures," Carey at 220, petitioner's collateral attack concluded at the Court of Appeals. That petitioner later received permission to make a filing outside the established procedures should not have the effect of retroactively "untolling" the statute under a strained interpretation of "pending" simply because the filing related to the same "round" of review, particularly when that "round" had, under the state's procedures, already concluded.[9] A more appropriate analysis, and one which allows for consideration of any potential extraordinary factors, is whether the time that elapsed should be equitably tolled.

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[9] I note that the situation here is not one where petitioner was close to meeting his procedural deadline but fell short by a few days; he was well over a year late of the established deadline for in [*sic*] seeking Oregon Supreme Court review of the denial of his petition. Such is quite different from the four-and-a-half month delay in seeking similar review in Carey, which occurred under California's rule simply requiring a filing within an unspecified "reasonable" time.

For that time to qualify for equitable tolling, petitioner must demonstrate that the delay in filing which caused the AEDPA limitations statute to expire was caused by "extraordinary circumstances beyond [his] control." Miranda v. Castro, 292 F.3d 1063 (9th Cir. 2002) (emphasis in original); see also Calderon v. United States District court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997). Here, petitioner points to the lack of assistance from his post-conviction attorney as the circumstance that prevented his timely filing, alleging that the attorney failed to notify him when the Oregon Court of Appeals granted the state summary affirmance, failed to notify him that he needed to seek review within 35 days, and failed to inform him of the issuance of the appellate judgment. However, these allegations fall squarely within the parameters of ordinary attorney negligence that the Ninth Circuit has routinely held to be inadequate grounds for equitable tolling. See, e.g., Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001); Ford v. Hubbard, 330 F.3d 1086, 1106 (9th Cir. 2002); see also Castro, 292 F.3d at 1067 n.4 (collecting cases); cf. Spitsyn v. Moore, 354 F.3d 796 (9th Cir. 2003) (holding that a complete failure to file his client's habeas petition and the retention of the client's files beyond the limitations period, despite numerous requests by the client, could be "sufficiently egregious" to warrant tolling).

Because petitioner has not alleged facts which would warrant equitable tolling, and because his habeas petition was filed after the expiration of the AEDPA statute of limitations for such filings, the petition should be denied.

CONCLUSION

For the above stated reasons, the amended petition for a writ of habeas corpus (#20) should be denied and the court should enter a judgment dismissing the action.

DATED this 9th day of September, 2004.

/s/ Thomas M. Coffin

Thomas M. Coffin

United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

ROBERT S. DIETRICH, Civil No. 01-498-TC

Petitioner,

vs.

S.W. CZERNIAK,

Respondent.

ORDER

Aiken, Judge:

Magistrate Judge Coffin issued his Findings and Recommendation in the above-captioned action on September 9, 2004. Magistrate Judge Coffin recommends that the amended petition for writ of habeas corpus be denied and the case be dismissed. Magistrate Judge Coffin found that the petition was filed beyond the one-year statute of limitations period under the Anti-Terrorism and Effective Death Penalty Act (AEDPA), and that the doctrine of equitable tolling did not apply. 28 U.S.C. § 2244(d)(1). The matter is now before me. See 28 U.S.C. § 636(b)(1)(B) and Fed. R. Civ. P. 72(b).

When either party objects to any portion of a magistrate judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the magistrate judge's report. See 28 U.S.C. §636(b)(1); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F.2d 1309, 1313 (9th Cir. 1981). Petitioner has filed timely objections to the Findings and Recommendation. I have, therefore, given de novo review of Judge Coffin's well-reasoned opinion, and I find no error.

THEREFORE, IT IS HEREBY ORDERED that Magistrate Judge Coffin's Findings and Recommendation (doc. 62) filed September 9, 2004, is ADOPTED in its entirety. The Amended Petition for Writ of Habeas Corpus (doc. 20) is DENIED, and this case is DISMISSED. IT IS SO ORDERED.

Dated this 15th day October, 2004.

/s/ Ann Aiken
Ann Aiken
United States District Judge

App. 10

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

ROBERT S. DIETRICH,

Petitioner,

vs.

S.W. CZERNIAK, Civil No. 01-498-TC

Respondent.

JUDGMENT

This action is dismissed.

Dated: October 18, 2004.

Donald M. Cinnamond, Clerk
By: /s/ Leslie Engdall, Deputy
Leslie Engdall, Deputy

JUDGMENT **DOCUMENT NO: 67**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT SANFORD DIETRICH, No. 04-36063

Petitioner-Appellant, D.C. No. CV-01-00498-TMC

vs.

STAN W. CZERNIAK, Superintendent, Oregon State Penitentiary, MEMORANDUM*

Respondent-Appellee.

Appeal from the Untied States District Court

for the District of Oregon

Thomas M Coffin, Magistrate Judge, Presiding

Argued and Submitted September 13, 2006

Portland, Oregon

Before: HAWKINS, SILVERMAN, and GOULD, Circuit Judges.

Petitioner Robert Dietrich ("Dietrich") appeals the district court's ruling that statutory and equitable tolling are inapplicable to prevent his habeas petition from being time-barred under the Antiterrorism and Effective Death Penalty Act of

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

1996 ("AEDPA'), 28 U.S.C. § 2241 *et. seq.* We have jurisdiction pursuant to 28 U.S.C. §§1291 and 2253. We affirm in part, and vacate and remand in part.

On January 29, 1997, Dietrich, with the assistance of appointed counsel, sought post-conviction relief in the Oregon trial court based on claims that his trial counsel was incompetent and Petitioner entered into an involuntary plea agreement. The trial court denied post-conviction relief. After a timely appeal, the Oregon Court of Appeals granted Respondent's motion for summary affirmance on January 22, 1999. When Petitioner did not seek discretionary review, the appeals court issued a final judgment on April 8, 1999 dismissing the claims.[1] Almost a year later, Dietrich learned of the dismissal by obtaining a copy of the docket sheet. He then promptly mailed a *pro se* motion for leave to file a late petition for discretionary review with the Supreme Court of Oregon, which was docketed on May 17, 2000. According to Dietrich, post-conviction counsel did not notify him of the result of the post-conviction review, despite Dietrich's several inquiries about the status of the appeal. The Supreme Court of Oregon granted Dietrich's motion for leave to file a late petition, but denied the petition on the merits on February 6, 2001.

The district court dismissed Petitioner's federal petition for habeas corpus as untimely. Adopting the Magistrate Judge's Findings and Recommendation, the district court held that under 28 U.S.C. § 2244(d)(2) and *Carey v. Saffold*, 536 U.S. 214 (2002), the interval between the April 8, 1999 judgment and Petitioner's May 17, 2000 motion for leave to file

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[1] Under Oregon law, a petitioner is allowed 35 days to file a petition for discretionary review with the Supreme Court of Oregon. *See* Or. Rev. State. § 2.520 and Or. R. App. P. § 9.05. Petitioner's time for filing a petition for discretionary review expired on February 26, 1999.

an untimely petition was not tolled by the statute because no state application was "pending" during this period.[2] The district court also held that equitable tolling was unjustified because allegations that counsel failed to notify Petitioner of the appellate judgment at best amounted to ordinary attorney negligence.

We review *de novo* the district court's denial of a petition for writ of habeas corpus as untimely. *Miles v. Prunty*, 187 F.3d 1104, 1105 (9th Cir. 1999). Findings of fact are reviewed for clear error. *Riley v. Payne*, 352 F.3d 1313, 1317 (9th Cir. 2003).

I. Statutory Tolling

Petitioner is not entitled to statutory tolling because he had no application for post-conviction relief pending during the interim between the April 8, 1999 judgment and Petitioner's May 17, 2000 motion for leave to file an untimely petition. In a recent decision clarifying *Saffold*, 536 U.S. 214, the United States Supreme Court held that "[t]he time that an application for state postconviction review is 'pending' includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law." *Evans v. Chavis*, 126 S. Ct. 846, 849, 163 L. Ed. 2d 684 (2006) (emphasis original).

Here, Dietrich did not under state law file a timely petition for discretionary review in the Supreme Court of Oregon. A person may petition the state supreme court "within 35 days

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[2] Because eighty-five days remained under the statute of limitations when Petitioner filed his initial state application on January 29, 1997, his federal petition was time-barred in light of the untolled period after the state court of appeals judgment.

after the date of the decision." Or. Rev. State. § 2.520. A petition after the 35-day period is late, even if the state supreme court forgives the untimeliness by granting a motion for leave to file a late petition.[3] When Petitioner's substantive claims were dismissed under the April 8, 1999 judgment, his application ceased to be "pending" in the ordinary appellate process. Dietrich's case was pending until April 8, 1999, and then was pending *again* after Dietrich reopened the case by seeking discretionary review through the May 17, 2000 motion. The interval between the pendencies, however, is not tolled by the statute because at that time the claim for relief was not pending. 28 U.S.C. § 2244(d)(2).

II. Equitable Tolling

The mere ineffective assistance of post-conviction counsel cannot be the basis for equitable tolling. *See Miranda v. Castro*, 292 F.3d 1063, 1067-1068 (9th Cir. 2002) (holding appointed counsel's miscalculation of the AEDPA limitations period was not grounds for equitable tolling because petitioner has no right to effective assistance of counsel during the post-conviction phase). We have acknowledged, however, "that where an attorney's misconduct is sufficiently egregious, it may constitute an 'extraordinary circumstance' warranting equitable tolling of AEDPA's statute of limitation." *Spitsyn v. Moore*, 345 F.3d 796, 800 (9th Cir. 2003) (remanding for determination of equitable tolling where retained post-conviction counsel made affirmative statements that he would file federal habeas petition but failed to do so, and where counsel did not release file to petitioner upon request). De-

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[3] Dietrich's request for discretionary review to the Supreme Court of Oregon was entitled "Motion for Leave to File *Late* Petition for Review and Substitute Counsel." (Emphasis added).

termining whether equitable tolling is warranted is a "fact-specific inquiry." *Frye v. Hickman*, 273 F.3d 1144, 1146 (9th Cir. 2001).

Here, no evidentiary hearing was held. The district court adopted the Magistrate Judge's determination that equitable tolling was not warranted where Petitioner recited that "the attorney failed to notify him when the Oregon Court of Appeals granted the state summary affirmance, failed to notify him that he needed to seek review within 35 days, and failed to inform him of the issuance of the appellate judgment." The district court, however, did not note the alleged attempts by Petitioner and his mother to reach the post-conviction counsel to inquire about Petitioner's case status. These facts were alleged in the record in Petitioner's brief in support of his May 17, 2000 motion for leave to file late petition.[4] It is thus unclear to what extent, if any, post-conviction counsel's lack of communication with or non-responsiveness to Petitioner and his mother hindered Petitioner from proceeding with his state application. *See Spitsyn*, 345 F.3d at 801 ("[W]ithout the file . . . it seems unrealistic to expect [petitioner] to prepare and file a meaningful petition on his own within the limitations period."). Because we consider there to be an insufficient development of the record, we cannot determine whether Petitioner faced extraordinary circumstances sufficient to justify equitable tolling. We conclude that a remand is appropriate for an evidentiary hearing, to be followed by the district court's legal ruling on equitable tolling. The district court in the evidentiary hearing should determine the circumstances in which Petitioner attempted to inquire about the status of his case and obtain his file and any impact these circumstances, once de-

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[4] The details of Petitioner's prior allegations are recited in the Petitioner's unsuccessful request to the district court for an evidentiary hearing, within Exhibit 130 to that request.

termined by the district court, may have had on Petitioner's ability to advance his interests in seeking a timely discretionary review by the Supreme Court of Oregon of his post-conviction claims for relief.

The district court's dismissal of Dietrich's petition as time-barred is **VACATED**. The case is **REMANDED** to the district court for an evidentiary hearing related to equitable tolling and for other proceedings not inconsistent with this decision.

No. 06-1060

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

ROBERT SANFORD DIETRICH,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court hear a challenge to the availability of equitable tolling in federal habeas corpus cases when the State never presented the issue in the district or circuit court, raises it for the first time in the petition for certiorari, and when his current argument conflicts with the position he advanced in the lower court?

2. Should this Court accept review of an unpublished circuit decision that ordered a remand, when the petitioner's contentions about the decision's impact are wrong?

No. 06-1060

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

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ROBERT SANFORD DIETRICH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR DENYING THE WRIT

I. THE STATUTE OF LIMITATIONS IS SUBJECT TO EQUITABLE TOLLING.

A. The Question whether a Habeas Corpus Petition Filed Subsequent to the Enactment of the AEDPA is Subject to Equitable Tolling was Never Raised Below and Has, Therefore, Been Waived.

For the first time in nearly six years, petitioner argues that equitable tolling does not exist under the AEDPA. (Cert. Petition, pp. 11-14). Robert Dietrich filed his *pro se* habeas

corpus petition in April 2001. With leave of court, appointed counsel filed an Amended petition in June 2002. Fifteen months later, on September 25, 2003, petitioner, filed his Answer and Response. (S.E.R. 50).[1] In his Response, petitioner never argued that equitable tolling was unavailable under 28 U.S.C. § 2244(d). Instead, petitioner argued that tolling should be denied because the "negligence" of state post-conviction counsel "is not an 'extraordinary circumstance' justifying equitable tolling." (S.E.R. 50). In a subsequent memorandum, filed in April 2004, petitioner again raised no categorical challenge.

In September 2004, the Magistrate Judge rejected Dietrich's tolling arguments. (App. 1-7). He first rejected statutory tolling, and then found that: "A more appropriate analysis, and one which allows for any potential extraordinary factors, is whether the time that elapsed should be equitably tolled." (App. 5). However, the Magistrate found that Dietrich had "not alleged facts which would warrant equitable tolling. . . ." (*Id*).

Petitioner's response to Dietrich's objections *endorsed* the Court's analysis:

> *The court's Findings and Recommendation dated September 9, 2004, are correct and should be adopted in their entirety.* Respondent continues to rely on his previously submitted Exhibits and Memoranda for arguments on this issue.

(Respondent's Appendix A) (emphasis added).

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[1] "S.E.R." refers to the Appellee's Supplemental Excerpt of Record that petitioner filed in the Ninth Circuit. "App" refers to the Appendix to petitioner's Petition for Writ of Certiorari filed in this Court.

Consistent with his district court pleadings, petitioner never raised any such challenge in his Ninth Circuit brief. Instead, petitioner again accepted the availability of equitable tolling but argued against its application in Dietrich's case because of an insufficient showing to warrant the doctrine's invocation. Petitioner framed the issue as follows: "Is equitable tolling of the statute of limitations in 28 U.S.C. §2244(d)(1) required when petitioner failed to timely file a petition for Oregon Supreme Court review of an order by the Oregon Court of Appeals summarily affirming the denial of petitioner's state post-conviction relief petition?" (Appellees' Brief, at 1). Petitioner then summarized his argument this way: "[T]he district court did not err in refusing to equitably toll the statute of limitations during the disputed period of time. Petitioner failed to prove that he had been diligently pursuing his rights or that his state post-conviction relief attorney's alleged negligence was sufficiently egregious to constitute an 'extraordinary circumstance' justifying equitable tolling of the federal statute of limitations." (Appellee's Brief. p.9).

In 2006, the Circuit remanded for a hearing on equitable tolling. (App. 11-16).

Now, in 2007, petitioner's argument challenging the availability of equitable tolling makes its first appearance in his petition for certiorari. But, in 2004, petitioner accepted the availability of equitable tolling. Thus, his current argument contradicts his own argument before the district court. Accordingly, this Court should reject petitioner's inconsistent and untimely attempt to circumvent preservation doctrine. *See Baldwin v. Reese*, 541 U.S. 27, 33-34 (2004) (deeming habeas corpus petitioner's argument waived under Sup. Ct. Rule

15.2 as it "first made its appearance in this Court,"); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56, n.4 (2002) ("Brunswick has asserted that federal maritime law governs this case. Because this argument was not raised below, it is waived."); *Roberts v. Galen of VA, Inc.*, 525 U.S. 249, 253-254 (1999) (per curiam) ("these claims do not appear to have been sufficiently developed below for us to assess them"). *See also New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("judicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'") (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n. 8 (2000)).

B. The AEDPA Statute of Limitations is Subject to Equitable Tolling.

In the federal courts of appeal, it is settled that the statute of limitations is subject to equitable tolling. *See* Advisory Committee Notes to Rule 3 of the Rules Governing Section 2254 Cases in the United States Courts ("Although the rule does not address the issue, every circuit that has addressed the issue has taken the position that equitable tolling of the statute of limitations is available in appropriate circumstances . . . .") (citations omitted).

Petitioner cannot cite one circuit decision holding that equitable tolling is unavailable under the AEDPA. (Cert. Petition, pp. 11-14). Petitioner does cite *Taliani v. Chrans*, 189 F.3d 597, 598 (7th Cir. 1999), in which the Seventh Circuit questioned the availability of equitable tolling. The Seventh Circuit has since stated that equitable tolling *is* available under 28 U.S.C. § 2255. *See United States v. Marcello*, 212 F.3d 1005, 1010

(7th Cir.2000) ("We know that §2255's period of limitation is not jurisdictional but is instead a procedural statute of limitations subject to equitable tolling.") (citing *Taliani*).

The uniformity of decisions reflects the nature of the writ. The discretion to toll the statute of limitations in habeas corpus cases is justified because habeas is, at its core, an equitable remedy for constitutional violations. *Schlup v. Delo*, 513 U.S. 298, 319 (1995) ("the Court has adhered to the principle that habeas corpus is, at its core, an equitable remedy"); *Withrow v. Williams,* 507 U.S. 680, 699 (1993) ("[c]oncerns for equity . . . resonate throughout our habeas jurisprudence."); *Kuhlmann v. Wilson,* 477 U.S. 436, 447 (1986) ("[i]n decisions of the past two or three decades, . . . the Court has reaffirmed that 'habeas corpus has traditionally been regarded as governed by equitable principles'") (citations omitted).

It cannot be said that Congress, cognizant of these precedents, silently abrogated the power of the federal courts to consider extraordinary circumstances that prevented the timely filing of habeas corpus petitions. *Cf. Clay v. United States*, 537 U.S. 522, 527 (2003) ("'we presume that Congress expects its statutes to be read in conformity with this Court's precedents'") (quoting *United States v. Wells*, 519 U.S. 582, 495 (1997))). Congress surely recognized the necessity that federal courts retain their equitable authority to consider extraordinary circumstances that prevented timely filing of a habeas petition. This holds especially true given the brief period of time in which prisoners must act.

Petitioner's reliance on *United States v. Brockamp*, 519 U.S. 347 (1997), is misplaced. In *Brockamp,* this Court found that the statutory time and amount limitations of a section of the Internal Revenue Code could not be equitably tolled. The *Brockamp* decision noted that Congress evinced no legislative intent to create equitable exceptions given that "[t]ax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities." *Id.* at 352.

In contrast to the tax system at issue in *Brockamp*, this Court has consistently reaffirmed the equitable nature of the writ of habeas corpus. Given this distinct jurisprudence, *Brockamp* has nothing to say about the federal judicial authority in reviewing criminal convictions and sentences.

For similar reasons, *United States v. Beggerly*, 524 U.S. 33 (1998), governing lawsuits under the Quite Title Act, has nothing to say about equitable power in habeas corpus cases. In *Beggerly*, this Court rejected equitable tolling under the Quiet Title Act because the Act "has already effectively allowed for equitable tolling" and also because "the unusually generous nature of the QTA's limitations time period [makes] extension of the statutory period by additional equitable tolling . . . unwarranted." *Id.* at 48-49. In contrast, the one-year filing period under 28 U.S.C. §2244(d), is not generous. *See Williams v. Sims*, 390 F.3d 958, 960 (7th Cir. 2004) (characterizing § 2244(d) as a short limitations period).

Finally, in *Beggerly*, this Court found that additional "[e]quitable tolling of the already generous statute of limitations incorporated in the QTA would disadvantage landowners by "throw[ing] a cloud of uncertainty over th[eir] rights[.]" 524 U.S. at 48. No such considerations are present in habeas corpus cases.

C. The Equitable Nature of Habeas Authority Requires Assessment of Individual Cases.

In an Amicus Curiae brief filed in this Court by several states, amici noted that, nationwide there has been a large volume of litigation on equitable tolling issues and argued that such litigation "has become increasingly burdensome to the states and the judiciary." Brief *Amici Curiae* of thirty-two states, in support of petitioner in *Belleque v. Kephart*, Supreme Court No. 06-1015, p. 15 (dated Feb. 23, 2007). Given the equitable nature of the writ, however, federal courts must retain their authority to evaluate claims of extraordinary circumstances outside of the prisoner's control. Clearly, states should not be able to rely on their own wrongdoing to preclude the federal courts from considering exceptional circumstances that prevent an incarcerated person from filing his petition on time. *See, e.g., King v. Bell*, 378 F.3d 550, 553-54 (6th Cir. 2004) (equitable tolling warranted because "government's failure to produce the *voir dire* transcripts prevented [petitioner] from complying with court's original scheduling order"). Tolling must also remain available when tardiness is directly attributable to an otherwise diligent prisoner's mental incompetency or the extreme neglect or malfeasance of one's lawyer. *See, e.g., Laws v. Lamarque*, 351 F.3d 919, 923 (9th Cir. 2003) ("Where a habeas petitioner's mental

incompetence in fact caused him to fail to meet the AEDPA filing deadline, his delay was caused by an 'extraordinary circumstance beyond [his] control,' and the deadline should be equitably tolled"); *United States v. Martin*, 408 F.3d 1089, 1096 (8th Cir. 2005) (granting equitable tolling because retained counsel "misrepresented the law, misrepresented the status of Martin's case, and retained possession of documents that were crucial to Martin's claim").

II. THE NINTH CIRCUIT'S STANDARD FOR EQUITABLE TOLLING IS ENTIRELY CONSISTENT WITH THIS COURT'S PRECEDENTS.

In seeking certiorari, petitioner argues that "[t]he Ninth Circuit has set the bar that must be cleared to obtain an evidentiary hearing much too low." (Cert. Petition, p. 23) *Dietrich*, of course, is an unpublished decision which cannot be cited as precedent. (*See* App. 11) (citing 9th Cir. R. 36-3). Hence, the decision has not set any bars.

To make its case for certiorari, petitioner, therefore, relies on a *different* decision by the Ninth Circuit, *to wit*: *Roy v. Lampert*, 455 F.3d 945, *amended*, 465 F.3d 964 (9th Cir. 2006). *Roy*, however, is not the leading case on equitable tolling. In *Pace v. DiGuglielmo*, 544 U.S. 408 (2005), this Court discussed the standard for equitable tolling.[2] To invoke this doctrine, a habeas litigant must demonstrate (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way. *Id.* at 418. Well before the *Pace* decision, the Ninth Circuit's decisions have been entirely faithful to this

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[2] In *Pace*, this Court assumed, without deciding, that equitable tolling is available under the Antiterrorism and Effective Death Penalty Act. 544 U.S. at 418 n.8.

standard. *See Calderon v. U.S. District Court (Beeler)*, 128 F.3d 1283, 1288 (9th Cir. 1997) (*overruled on other grounds*). The Circuit emphasizes that equitable tolling is "unavailable in most cases." *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999). "Indeed, 'the threshold necessary to trigger equitable tolling [under AEDPA] is very high, lest the exceptions swallow the rule.'" *Miranda v. Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002). The *Roy* Court only allowed two Oregon prisoners, who had been sent to a private prison in Arizona, to present evidence in support of their equitable tolling claims.

In *Roy*, the respondent-prisoner (named Kephart), recently filed a Brief in Opposition to Petition For Certiorari, *Belleque v. Kephart*, Supreme Court No. 06-1015, p. 15 (filed February 23, 2007). In that brief, the respondent demonstrated that courts within the Ninth Circuit strictly enforce the timetable mandated by 28 U.S.C. § 2244(d). Moreover, the brief further demonstrated that evidentiary hearings on equitable tolling are rare within the Ninth Circuit. Thus, petitioner's argument, as well as his prediction of excessive evidentiary hearings are simply wrong.

CONCLUSION

Petitioner has not presented any compelling reason for this Court to grant the petition. Respondent respectfully requests that the petition be denied.

DATED this 2nd day of March, 2007.

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

ROBERT S. DIETRICH,

Petitioner,

v.

STAN CZERNIAK, Superintendent, Oregon State Penitentiary,

Respondent.

Case No. 01-498-TC

RESPONSE TO PETITIONER'S OBJECTIONS TO FINDINGS AND RECOMMENDATION

The court's Findings and Recommendation dated September 9, 2004 are correct and should be adopted in their entirety. Respondent continues to rely on his previously submitted Exhibits and Memoranda for arguments on this issue.

DATED this 29th day of September, 2004.

Respectfully submitted,

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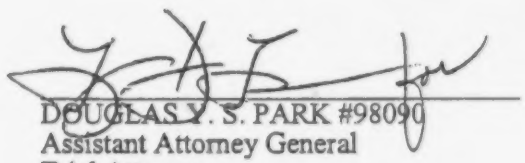
CERTIFICATE OF SERVICE

I certify that on September 29, 2004, I served the foregoing RESPONSE TO PETITIONER'S OBJECTIONS TO FINDINGS AND RECOMMENDATION upon the parties hereto by the method indicated below, and addressed to the following:

Mr. Anthony Bornstein
Assistant Federal Public Defender
101 S.W. Main Street, Suite 1700
Portland, OR 97204

____ HAND DELIVER
__X__ U.S. MAIL
____ OVERNIGHT MAIL
____ TELECOPY (FAX)



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No. 06-1060

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

ROBERT SANFORD DIETRICH,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF SERVICE AND MAILING

I, Anthony Bornstein, counsel of record, certify that pursuant to Rule 29.3, service has been made of the within MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*, and BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the counsel for the petitioner by depositing in the United States Post Office, in Portland,

Oregon, on March 2, 2007, first-class postage prepaid, a certified true, exact, and full copy thereof addressed to:

Mary H. Williams
Solicitor General of Oregon
Department of Justice
1162 Court Street NE
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Paul Clement
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Further, the original and ten copies were mailed to the Honorable William K. Suter, Clerk of the United States Supreme Court, by depositing them in a United States Post Office Box, addressed to 1 First Street, N.E., Washington, D.C., 20543, for filing on March 2, 2007, with first-class postage prepaid.

Anthony D. Bornstein

Anthony D. Bornstein
Attorney for Respondent

SUBSCRIBED AND SWORN to before me on March 2, 2007.

Jill Lammé

Notary Public of Oregon
My Commission Expires: 9/01/08

Supreme Court, U.S.
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(3)

No. 06-1060

IN THE

SUPREME COURT OF THE UNITED STATES

BRIAN BELLEQUE, Superintendent,
Oregon State Penitentiary,

Petitioner,

v.

ROBERT SANFORD DIETRICH,

Respondent.

MOTION FOR LEAVE
TO PROCEED *IN FORMA PAUPERIS*

The respondent, Robert Sanford Dietrich, requests leave to file the attached brief in opposition to petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39.1 of this Court and 18 U.S.C. § 3006A(d)(6). The respondent was represented by counsel appointed under the Criminal Justice Act in the United States District Court for the

District of Oregon and on appeal in the United States Court of Appeals for the Ninth Circuit, and therefore no affidavit is required.

Respectfully submitted this 2nd day of March, 2007.

Anthony D. Bornstein

Anthony D. Bornstein
Attorney for Respondent

1
REP

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FILED
MAR 13 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1060

In the Supreme Court of the United States

BRIAN BELLEQUE, Superintendent, Oregon State Penitentiary,

Petitioner,

v.

ROBERT SANFORD DIETRICH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF

A. Respondent fails to respond to significant points made in the petition.

It is notable that the brief in opposition ignores and does not take issue with some important points made in the petition for a writ of certiorari. What is first striking is not what the brief in opposition says, but what it fails to address.

If equitable tolling applies at all in this AEDPA context, the petition asserts that the Court of Appeals for the Ninth Circuit erred in accepting that mere attorney negligence and a failure to communicate can amount to an extraordinary circumstance that would warrant equitable tolling. (Pet. Cert. 10). The petition also contends that the Ninth Circuit's decision in this regard conflicts with the decisions of most other courts of appeals, which also are in analytical conflict with each other. The petition outlines that conflict and describes the various positions that different federal courts of appeals have taken. (Pet. Cert. 15-19). Most circuits that have considered the issue have held that attorney negligence, such as the failure to notify a client of the denial of state post-conviction relief or misadvice about the AEDPA statute of limitations, is not an extraordinary circumstance that warrants equitable tolling. (Pet. Cert. 15-18) (citations omitted). Other courts have taken other positions, some stricter and others not. (Pet. Cert. 18-19) (citations omitted). In its petition, the State asked this Court to issue a writ of certiorari to resolve the circuit conflict and to determine when, if ever, attorney negligence, misconduct, misadvice, or a failure to communicate with a client can amount to an extraordinary circumstance justifying equitable tolling (Pet. Cert. 19-20).

Other than asserting that "[to]lling must * * * remain available when tardiness is directly attributable to an otherwise diligent prisoner's mental incompetency or the extreme

neglect or malfeasance of one's lawyer," (Opp. Br. 7; citations omitted), respondent ignores the State's argument. He does not contend that anything more than attorney negligence and an alleged failure to communicate is involved in this case. And he does not dispute that there is a circuit split regarding when, if ever, attorney negligence, misrepresentation, and malfeasance may be enough to justify equitable tolling, assuming the doctrine applies in the AEDPA context.[1]

Relying in part on its petition for a writ of certiorari in *Belleque v. Kephart* (06-1015), the State also contends that the Ninth Circuit has set the bar far too low for obtaining an evidentiary hearing on equitable tolling. (Pet. Cert. 20). The State demonstrated in its petition that there also is a circuit split regarding how much of a showing is required to obtain an evidentiary hearing on a claim of equitable tolling. (Pet. Cert. 20-22) (citations omitted). The State argued that in this case the Ninth Circuit compounded the error it made in *Kephart* by taking an approach that is inconsistent with and even less demanding than that taken by the court in that case. (Pet. Cert. 22). Here, the Ninth Circuit ordered an evidentiary hearing because it was 'unclear to what extent, *if any,* respon-

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[1] The cases respondent cites (Opp. Br. 7-8) do not in any way undermine the State's position. *Laws v. Lamarque*, 351 F.3d 919 (9th Cir. 2003), is inapplicable. It deals with a *habeas* petitioner's alleged incompetency. *United States v. Martin,* 408 F.3d 1089 (8th Cir. 2005), is cited in the State's petition as an example of the divergent analyses that the circuit courts of appeals have applied to claims of attorney negligence or misconduct and as an example of a decision that "appear[s] to apply an analys[i]s that approximates the one employed by the Ninth Circuit in this case." (Pet. Cert. 19). Thus, that it might appear to support respondent's position is hardly surprising.

dent had been hindered by the [post-conviction appellate] attorney's alleged failure to communicate. (Pet. App. 15) (emphasis added). Demanding so little from a habeas petitioner in order to obtain an evidentiary hearing will waste federal judicial time and resources, and force the States into unnecessary evidentiary hearings. (Pet. Cert. 23).

In his brief in opposition, respondent again ignores the circuit split. He does not contend that it does not exist. He also does not disagree that the Ninth Circuit is reaching inconsistent results with regard to whether evidentiary hearings must be held on claims of equitable tolling. He does not dispute that the Ninth Circuit ordered an evidentiary hearing in this case even though there was no allegation that a causal connection existed between the attorney's alleged failure to communicate and respondent's late filing of his federal habeas petition.[2]

B. Equitable tolling is not available to excuse the untimely filing of a section 2254 habeas petition.

The State contends that the Ninth Circuit erred in holding that equitable tolling is available to excuse the otherwise untimely filing of a section 2254 habeas petition. (Pet. Cert. 11-14). Respondent's rejoinder is two-fold. The State did not raise this issue in the courts below; indeed, in respondent's view the State's "current argument contradicts [its] own argument before the district court." (Opp. Br. 3). And "it is settled that the [AEDPA] statute of limitations is subject to equitable tolling." (Opp. Br. 4). Neither claim should dissuade this Court from granting certiorari to decide the extremely important issue of whether equitable tolling applies in cases brought under section 2254.

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[2] The responses he does offer are addressed below.

As to respondent's first point, the State admitted in its petition that it had not raised the no-equitable-tolling argument in either the district court or the Ninth Circuit. (Pet. Cert. 11). But the Ninth Circuit's decision is necessarily based on the conclusion that equitable tolling applies in this context. The court cited two of its own earlier decisions holding that equitable tolling is available in cases brought under section 2254. (Pet. Cert., App. 14, citing *Miranda v. Castro*, 292 F.3d 1063 (9th Cir. 2002), and *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003)). In *Miranda*, the court noted that it had "recognized that AEDPA's statute of limitations provision is subject to equitable tolling." 292 F.3d at 1066 (citation omitted). In *Spitsyn,* the court observed that it had "held that the one-year statute of limitations for filing a habeas petition may be equitably tolled[.]" 345 F.3d at 799. That equitable tolling is available in cases brought under section 2254 is a necessary underpinning of the Ninth Circuit's decision in this case.

The State's failure to have explicitly raised the issue earlier does not preclude this Court's review. As discussed, the Ninth Circuit's decision necessarily rests on the conclusion that equitable tolling is available. It is "the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed *or passed upon* in the courts below." *Kentucky v. Stincer,* 482 U.S. 730, 747 n. 22 (1987) (internal quotation marks and citations omitted; emphasis added). Here, the Ninth Circuit in effect "passed upon" the issue of whether equitable tolling is available in this federal habeas corpus context.

Respondent is simply incorrect when he asserts that in the district court the State "endorsed" the idea that equitable tolling applies and that the State's present position somehow "contradicts" its earlier arguments. (Opp. Br. 2, 3). It is true

that in the courts below the State did not directly challenge the potential availability of equitable tolling.[3] It would have been futile for the State to have done so. The district court was bound by the Ninth Circuit's prior decisions holding that equitable tolling is available, and the Ninth Circuit would have followed its own case law. In any event, there is a world of difference between "endorsing" a legal proposition and merely failing to take it on directly. Nothing about the position the State takes now "contradicts" the position it has taken earlier in this litigation. The State always has insisted that respondent is not entitled to equitable tolling.

In addition, and even if the State's failure to have raised the issue below meant that it could not directly raise the issue now, if this Court were to grant certiorari on some other question or questions presented in the State's petition, the Court could consider the additional legal issue of the availability of equitable tolling in a section 2254 case. Once this Court's jurisdiction has attached, "consideration of issues not present in the jurisdictional statement or petition for certiorari *and not presented in the [lower court]* is not beyond [the Court's] power, and in appropriate circumstances [the Court] ha[s] addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980) (emphasis added). It would be appropriate to discuss this important legal issue here because of the significant interest that the States, habeas petitioners, and lower federal courts have in the issue, and because it logically underlies the other issues involving equitable tolling that are raised in the petition.

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[3] As noted in the petition, however, in its Ninth Circuit brief the State pointed out that this Court had not decided the issue. (Appellee's Br. 30 n. 7, citing *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n. 8 (2005)).

The cases on which respondent relies as indicating that the State cannot pursue the issue of the availability of equitable tolling are inapposite. Respondent cites *Baldwin v. Reese*, 541 U.S. 27 (2004) (Opp. Br. 3-4), but there the Court observed that "[u]nder this Court's Rule 15.2, 'a nonjurisdictional argument not raised in a respondent's brief in opposition to a petition for a writ of certiorari may be deemed waived.'" *Id.*, 541 U.S. at 34. That rule, and that holding, do not apply here.[4] Respondent cites *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002). (Opp. Br. 4). In that case, the Court held that an issue not raised by a respondent in the courts below was "waived." *Id.*, 537 U.S. at 56 n. 4. Nothing in the Court's opinion suggests that the courts below had ruled on the issue, however, and that fact distinguishes this case from that one. Respondent also relies on *Roberts v. Galen of Va., Inc.*, 525 U.S. 249 (1999) (*per curiam*). (Opp. Br. 4). There, this Court refused to consider two alternative grounds for affirmance offered by the respondent because they "do not appear to have been sufficiently developed below for [the Court] to assess them." *Id.*, 525 U.S. at 253-54. Because the equitable tolling issue here is a legal one, there is no factual record that needed to be "sufficiently developed below." Thus, this decision too is inapplicable. Finally, respondent cites *New Hampshire v. Maine*, 532 U.S. 742 (2001). (Opp. Br. 4). In that case, in listing the factors that "typically inform the decision whether to apply the doctrine [of judicial estoppel] in a particular case," this Court stated that "a party's later position must be 'clearly inconsistent' with its earlier position" and that "courts regularly inquire whether the party has succeeded in persuading a court to accept that party's earlier position * * *." *New Hampshire v. Maine,* 532 U.S. at 750. As discussed, the State's position now

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[4] Moreover, in *Reese* the Ninth Circuit had not passed on the issue that respondent raised in his merits brief. *Id.*

is not inconsistent, "clearly" or otherwise, with its earlier stance in this case, and the State did not "persuade" the courts below that equitable tolling is available. They already were persuaded, and it was respondent who contended that he is entitled to equitable tolling.

On the merits of the State's claim that equitable tolling is not available in a case brought under section 2254, respondent contends that "it is settled that the [AEDPA] statute of limitations is subject to equitable tolling." (Opp. Br. 4) (citation omitted). The issue is not "settled" in this Court, however. If it were, this Court would not have twice pointed out, the last time quite recently, that this Court has not yet ruled on the issue. *Lawrence v. Florida*, ___ U.S. ___ (2/20/07) (slip op. 8) ("We have not decided whether § 2244(d) allows for equitable tolling," but assuming it does because the parties proceeded on that assumption); *Pace v. DiGuglielmo*, 544 U.S. 408, 418 n. 8 (2005) (same). Moreover, although respondent is correct in asserting that there is no circuit split on the issue (Opp. Br. 4), that hardly offers any solace to the States if the circuits that have ruled on the issue have all gotten it wrong, leading to much unnecessary litigation over the precise contours of equitable tolling in the habeas corpus setting.

Respondent also contends that this Court's decisions in *United States v. Brockamp*, 519 U.S. 347 (1997), and *United States v.* Beggerly, 524 U.S. 33 (1998) — relied on by the State in its petition (Pet. Cert. 13-14) — are inapplicable and "have] nothing to say" in this context because they are about tax law and the quiet title act, respectively, and because habeas corpus is an equitable remedy. (Opp. Br. 6). Respondent misunderstands the basis for the State's reliance on *Brockamp* and *Beggerly* and why they are significant here. The important teaching of *Brockamp* is, as this Court later stated in *Beggerly*, 524 U.S. at 48, that "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant stat-

ute." The State's point is not that *Brockamp* and *Beggerly* are directly applicable here, but that the text of section 2244(d) also is inconsistent with equitable tolling and that the lower federal courts that have ruled that equitable tolling is available have failed to give due attention to the statutory text. *See Brockamp*, 519 U.S. at 351-52 (relying on the "explicit exceptions" to the time limits set out in the statute and on the statute's detail); *Beggerly,* 524 U.S. at 48 (concluding that equitable tolling is inconsistent with the statute at issue there, in part because the statute effectively already provided for equitable tolling because it started the clock running when the plaintiff knew or should have known of the claim).[5]

In arguing that equitable tolling is available, respondent also insists that "[c]learly, states should not be able to rely on their own wrongdoing to preclude the federal courts from considering exceptional circumstances that prevent an incarcerated person from filing his petition on time." (Opp. Br. 7) (citation omitted). That assertion, far from advancing respondent's argument, helps to make the State's point that section 2254(d)(1) is a completed Congressional statement about when the statute of limitations should be tolled. One of those circumstances is when a State has created an impediment "in violation of the Constitution or laws of the United States[.]" 28 U.S.C. § 2254(d)(1)(B).

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[5] 28 U.S.C. § 2244(d)(D) states that the limitations period runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." Thus, it, like the statute under scrutiny in *Beggerly*, already effectively allows for equitable tolling. Section 2254(d) is set out in full in the petition. (Pet. Cert. 1-2).

C. The Ninth Circuit set the bar for obtaining an evidentiary hearing far too low; its approach conflicts with that of other circuits.

In its petition, the State argued that the Ninth Circuit was requiring much too little from federal habeas petitioners to obtain an evidentiary hearing on equitable tolling. (Pet. Cert. 20-23). Relying in part on its petition filed in *Kephart*, the State contended that the Ninth Circuit's approach, in addition to being too lax, conflicted with the approach taken by other federal courts of appeals. (Pet. Cert. 20-22). The State argued that in this case the Ninth Circuit compounded the error it made in Kephart's case when it took an approach that is inconsistent with and even less demanding than that taken by the court in that earlier decision. (Pet. Cert. 22).

As discussed above, respondent does not contend that there is no circuit split or dispute that the Ninth Circuit is reaching inconsistent results. (Opp. Br. 8-9). Instead, his first response is that the decision in this case is unpublished. (Opp. Br. 8). That fact is true, but it in no way precludes this Court's review. On more than one occasion, this Court has granted certiorari in cases where the Ninth Circuit's disposition was not published. *See, e.g., Behrens v. Pelletier*, 516 U.S. 299, 305 (1996); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 452-54 (1993); *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 13-14 (1987);[6] and *United States v. Janis*, 428 U.S. 433, 439 (1976).

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[6] Although this Court's decision may not make it entirely clear, the Ninth Circuit's decision in that case was unpublished. *Iowa Mutual Ins. Co. v. LaPlante*, 774 F.2d 1174 (9th Cir. 1985).

Respondent also contends that "courts within the Ninth Circuit strictly enforce the timetable mandated by 28 U.S.C. § 2244(d)" and that "evidentiary hearings on equitable tolling are rare within the Ninth Circuit." (Opp. Br. 9). As explained in the State's reply brief in *Kephart* (at 4-5), those assertions, assuming they are accurate, are irrelevant to the State's concerns. The State's concerns are not with past practice, but with broad legal issues that are of great significance to the States, habeas petitioners, and lower federal courts, and with what may happen in the future.

CONCLUSION

For the reasons given in the petition for certiorari and in this reply brief, petitioner respectfully requests that this Court grant the petition for certiorari and reverse the decision of the court below.

Respectfully submitted,

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